In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 555

GREYHOUND LINES, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (268 F. Supp. 746), dismissing an action brought to set aside an order of the Interstate Commerce Commission (J.S. App. B). The order denied Greyhound Lines, Inc., leave to cancel a tariff provision whereby Greyhound and another motor common carrier, Missouri, Kansas and Oklahoma Coach Lines (MK & O), mutually honor the tickets of each other (optional honoring) for passenger bus

286-486—67——1

service between Oklahoma City, Oklahoma, and St. Louis, Missouri, and all intermediate common points. Greyhound has thus been obliged to maintain the optional honoring provision in its tariff.

The optional honoring arrangement between Greyhound and MK & O, which has been in effect since 1939, permits a ticketholder, at his option, to take the bus of either carrier, regardless of which one issued him the ticket. The carrier performing the service is then reimbursed by the selling carrier for the value of the ticket less a commission. Since the optional honoring agreement constitutes a service or rule applied in connection with fares or charges, Greyhound was required to file the agreement with the Commission as part of its tariff. Section 217(a) of the Interstate Commerce Act, 49 U.S.C. 317(a); 49 C.F.R. 186.0(a).

Several years ago, conflicts developed in the relationship between Greyhound and MK & O and, in partial response thereto, Greyhound sought to terminate its optional honoring arrangement with MK & O. Accordingly, Greyhound filed with the Commission, under Section 217(c) of the Interstate Commerce Act, 49 U.S.C. 317(c), a proposed change to its existing tariff, eliminating the optional honoring arrangement, which was to become effective after thirty days.[1] Pursuant to Section 216(g) of the Interstate Commerce Act, 49 U.S.C. 316(g), and Section

[1] Although Greyhound maintained optional honoring arrangements with numerous other carriers throughout the United States, it proposed to cancel at that time only the arrangement it had with MK & O.

1.42 of the Commission's General Rules of Practice, 49 C.F.R. 1.42, MK & O protested Greyhound's proposed tariff change, and the Commission, pursuant to Section 216(g), suspended the proposed change.

On written evidence, the Commission found (1) that it had jurisdiction, pursuant to Sections 217(c) and 216(g), because the cancellation of the optional honoring arrangement would involve a change in a rule or practice that Greyhound applied in connection with its fares which affected the value of the service thereunder; (2) that the traveling public would be materially injured by its termination because the ticket holders would have the utility of their tickets reduced, by no longer having available the large number of scheduled buses that were available under the arrangement; (3) that MK & O would be materially injured by a cancellation of the arrangement since its revenues would be seriously impaired, thereby threatening elimination of MK & O as an effective competitor of Greyhound between Oklahoma City and St. Louis;* and (4) that Greyhound, whose sole object in canceling the arrangement appeared to be to injure severely the smaller MK & O, had failed to sustain its burden under Section 216(g) of proving that the proposed change would be just and reasonable. On this basis the Commission ordered Greyhound to cancel the proposed tariff change.

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*Moreover, there was threat to the traveling public in the Oklahoma area north and west of Tulsa and Oklahoma City, because said public was totally dependent upon MK & O for a local bus operation which MK & O supported by its operations between Oklahoma City and St. Louis (J.S. 31).

On Greyhound's petition to set aside the Commission's order, the three-judge court below unanimously affirmed the order, holding that the Commission had jurisdiction over the proposed cancellation of the optional honoring arrangement, even though it had been voluntarily established originally (J.S. 24). The court also upheld the Commission's finding that Greyhound had failed to meet its burden of proving the reasonableness of its proposed tariff change, especially in light of the substantial, unfavorable consequences the change would have occasioned for MK & O and the traveling public (J.S. 23-24).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The Commission's finding that appellant had not shown its proposed tariff change to be just and reasonable lies within its exclusive province and, as unanimously determined by the court below, represents a reasonable exercise of its judgment and discretion. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 285-286; *Western Paper Makers' Chem. Co.* v. *United States*, 271 U.S. 268, 269, 270; *New England Motor Rate Bureau, Inc.* v. *United States*, 254 F. Supp. 633 (D. Mass.), *affirmed per curiam*, 385 U.S. 203; *Baltimore & O. R.R.* v. *United States*, 249 F. Supp. 712 (W.D. Pa.), *affirmed per curiam*, 385 U.S. 3.

The Commission is vested with the exclusive power to suspend and investigate a proposed rate or fare change. *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658, 662. When it does so the burden

of proving that the change is just and reasonable rests upon the carrier proponent. 49 U.S.C. 316(g). *A.T. & S.F. Ry. Co.* v. *United States*, 279 U.S. 768, 773; *Accelerated Transport-Pony Express, Inc.* v. *United States*, 227 F. Supp. 815, 819–820 (D. Vt.), *affirmed per curiam*, 379 U.S. 4.

Appellant argues, however, that the Commission could not have initially compelled it to enter into an optional honoring agreement and, therefore, the Commission may not preclude it from withdrawing from such an arrangement. But as the court below noted the question of the Commission's power to preclude a carrier from withdrawing from such an arrangement is discrete from the question of its power initially to compel such arrangement (J.S. 21).

The clear language of the Act provides that once a tariff has been filed by a carrier, the Commission may preclude the carrier from changing any part of its operation under that tariff "affecting * * * the value of the service thereunder" unless the carrier can establish that the change is just and reasonable. 49 U.S.C. 316(g), 317(c).

Appellant's tariff change proposed to eliminate, without any modification in the fare, the optional honoring arrangement that appellant had for years offered to its patrons in cooperation with MK & O. The Commission found this arrangement to be of considerable value to prospective passengers, because it gave them a wider choice of schedules and afforded them better service to a greater number of intermediate points than if their purchase of tickets con-

fined them to the buses of the issuing carrier only (J.S. 33). Therefore, the "value of service" as prescribed by Sections 217(c) and 216(g) would have been adversely affected by the cancellation of the optional honoring plan. Thus the Commission did have jurisdiction under the statute to preclude appellant from canceling its optional honoring arrangement with MK & O. Cf. *Baltimore & O. R. Co.* v. *Hamburger*, 155 Fed. 849, 851–52 (E.D. Va.).[3]

[3] The cases on which appellant relies to support the contention that the Commission may not preclude the termination of a service which it could not initially compel all involved a statute (49 U.S.C. 316(c)) which is construed to prohibit the Commission from compelling the institution of through route arrangements between common carriers of *property* (J.S. 22–23). As the court below recognized (J.S. 23) these cases are distinguishable because no similar prohibition exists with respect to motor carriers of *passengers* regarding either through routes (see 49 U.S.C. 316(a)), or other rules and practices that may apply in connection with fares and charges. See, *e.g.*, *United States* v. *Capital Transit Co.*, 325 U.S. 357, 362–363; *Restriction To Through Routes, Thunderbird Transp. Co.*, 313 I.C.C. 271, 273–274.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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